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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-571

CAROL SMITH SHANNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On August 1, 1973, the Commissioner of Internal Revenue made a jeopardy assessment of income taxes for the year 1969 of $22,833,933.02 against C. Arnholt Smith, in accordance with Section 6861 of the Internal Revenue Code of 1954 (I-R. 5, 16).[1] On October 3, 1973, the Commissioner served a notice of levy upon petitioner, the daughter of C. Arnholt

[1] "R." references are to the record appendix filed in the court of appeals.

Smith, as his nominee, agent, or transferee. The notice of levy was for $23,256,414.78, and specifically sought to attach all of C. Arnholt Smith's interest in $478,366.35, which petitioner allegedly had withdrawn on August 3, 1973, from an account in the United California Bank (I-R. 5, 79).

On October 19, 1973, pursuant to the provisions of Sections 6861(a) and 6901(a)(1)(A)(i) of the Code, the Commissioner made a $2,645,329.35 jeopardy assessment against petitioner as transferee of C. Arnholt Smith (I-R. 17). The Commissioner then served a notice of levy upon the assets of petitioner and filed a lien in the Office of the County Recorder for the County of San Diego, California (I-R. 79-80). After making final demand for payment, the Commissioner issued to petitioner a statutory notice of deficiency of $630,635.90, pursuant to Sections 6212 and 6861(b) of the Code (I-R. 17, 80).[2]

Petitioner thereupon instituted this suit in the United States District Court for the Southern District of California. She sought an injunction against the enforcement of the levy, a declaration that the Internal Revenue Service had wrongfully levied upon her property, a return of her property free of any levy, a declaration that she was not the transferee of her father, C. Arnholt Smith, and the voiding of the jeopardy assessment on the ground that it was an abuse of discretion (I-R. 1-5). In her complaint,

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[2] The assessment had been reduced to this figure on November 12, 1973 (I-R. 80).

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petitioner alleged, *inter alia*, that (1) she was the true owner of all the assets levied upon by the Internal Revenue Service; (2) she was not a transferee of C. Arnholt Smith; (3) C. Arnholt Smith was not insolvent at the time of any alleged transfer to her; (4) the jeopardy assessment and levy was arbitrary, capricious and an abuse of discretion and caused her irreparable injury (I-R. 3-4).

The government moved to dismiss the complaint, asserting that (1) the suit was barred by the Anti-Injunction Act, 26 U.S.C. 7421; (2) the suit was barred by sovereign immunity; and (3) the complaint failed to state a claim upon which relief could be granted (I-R. 14). After hearing argument, the district court denied the motion to dismiss and granted a preliminary injunction against the enforcement of any levy pending final hearing and determination. The court held, *inter alia*, that 26 U.S.C. 7421 did not bar the action (I-R. 48; II-R. 42-43).

The court of appeals reversed and remanded the case to the district court with directions to dismiss the complaint for lack of jurisdiction (Pet. App. A 12-20). It held that petitioner could not avoid the jurisdictional bar of 26 U.S.C. 7421(b)(1) because she had not established that under no circumstances could the government prevail on the merits of its claim in accordance with this Court's decision in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1.

1. 26 U.S.C. 7421(b)(1) prohibits all suits seeking to restrain "the assessment or collection * * * of

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the amount of the liability * * * of a transferee of property of a taxpayer in respect of any internal revenue tax." Petitioner asserts (Pet. 4-6) that the court of appeals erred in holding that Section 7421 (b)(1) barred the district court from considering whether she was a transferee under Section 6901 of the Internal Revenue Code. But the court of appeals did not so hold; it simply concluded that petitioner failed to establish that she was not a transferee (Pet. App. A20).[3]

Thus, contrary to petitioner's argument (Pet. 4-6), the decision below does not conflict with either *Shelton* v. *Gill*, 202 F.2d 503 (C.A. 4), or *Botta* v. *Scanlon*, 288 F.2d 504 (C.A. 2). Unlike this case, the plaintiffs in *Shelton* presented specific evidence which demonstrated that they were not transferees. In *Botta*, the court merely accorded the plaintiffs an opportunity to amend their complaint "to allege facts showing that Section 7421 is inapplicable to them" (288 F.2d at 508).[4]

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[3] Petitioner also asserts (Pet. 5-6) that the government can, by labelling one as a transferee, "revoke the party's right to bring or continue in an action." But it has long been established that, as the court of appeals correctly recognized (Pet. App. A 17), a person assessed as a transferee may petition the Tax Court for a redetermination or pay the tax and sue for a refund. See *Phillips* v. *Commissioner*, 283 U.S. 589, 597-598.

[4] On a second appeal in *Botta* v. *Scanlon*, 314 F.2d 392, 394, the court noted that "[s]ince the assessments here were made against the appellants, their reference to cases in which the government sought to satisfy the tax obligation of one out of the property of another * * * are inapposite."

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At all events, the authority of *Shelton* v. *Gill*, *supra*, and *Holland* v. *Nix*, 214 F.2d 317 (C.A. 5) (Pet. 5, 9), both of which relied upon *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, has been undermined by this Court's subsequent decision in *Enochs* v. *Williams Packing Co.*, *supra*, 370 U.S. at 7. There, the Court held that an injunctive suit against the assessment or collection of a tax was barred by 26 U.S.C. 7421 unless it was "apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim" and equity jurisdiction otherwise exists. As the Court recently stated in *Bob Jones University* v. *Simon*, 416 U.S. 725, 737, 744-745, *Williams Packing* gave literal effect to Anti-Injunction Act and "rehabilitate[d] the Act following [the] debilitating departures from its explicit language" in *Miller* v. *Standard Nut Margarine Co.*, *supra*.

2. The court of appeals correctly concluded that petitioner did not meet the *Williams Packing* test of showing that under no circumstances could the government prevail on the merits of its claim. As it observed (Pet. App. A 20), when the district court granted the preliminary injunction, the record was limited to the complaint and "three unilluminating affidavits". Thus, there was no evidentiary support or even any factual allegation for any of the conclusory allegations in petitioner's complaint that she was not a transferee nor the owner of the assets subjected to the levy.

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Nothing in any of the decisions cited by petitioner (Pet. 6-9) is to the contrary. Unlike the taxpayers in *Pizzarello* v. *United States*, 408 F.2d 579 (C.A. 2), and *Lucia* v. *United States*, 474 F.2d 565 (C.A. 5) (*en banc*), petitioner has not shown that the transferee liability assessment against her is without any foundation.

In *Pizzarello*, the Second Circuit relied upon *Williams Packing* in reversing the denial of an injunction against a gambling excise tax assessment which was based upon a five-year projection of wagering activity. That case, however, is distinguishable. There, the taxpayer had been indicted for operating a gambling establishment for two weeks. Because of this obvious disparity in the time periods, the court found "no proof in the record * * * that Pizzarello operated as a gambler for five years or that, even if he did so operate, his three-day average * * * represented his average daily business for the other 1,575 days" (408 F.2d at 583). In determining the assessment to be excessive, the court noted that the Commissioner's determination that the taxpayer was engaged in gambling activity for five years was "unsupported either by the record or by affidavits" (*id.* at 584).[5]

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[5] Compare, however, *Hamilton* v. *United States*, 309 F. Supp. 468 (S.D. N.Y.), affirmed *per curiam*, 429 F.2d 427, certiorari denied, 401 U.S. 913, where the Second Circuit more recently affirmed the district court's denial of an injunction, although the assessment for wagering taxes, based on records covering three days, was projected over almost four years.

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Lucia similarly involved a gambling excise tax assessment based upon a projection of wagering activity. But unlike petitioner, the taxpayer in *Lucia* argued on appeal that he could demonstrate the error in the projection employed by the government. In remanding the case to the district court for a factual determination of the taxpayer's allegation that the assessment was without foundation, the Fifth Circuit explicitly stated that "the taxpayer, Lucia, will have to prove his case upon remand, and the extent of our holding goes no further than to give him that opportunity" (474 F.2d at 575; footnote omitted). Thus, in conformity with the decision below, *Lucia* squarely places the burden of meeting the first aspect of the *Williams Packing* test—that the assessment is without any foundation—upon the taxpayer.[6]

Moreover, the decision below does not conflict with *Shapiro* v. *Secretary of State*, 499 F.2d 527 (C.A. D.C.), certiorari granted *sub nom. Commissioner* v. *Shapiro*, 420 U.S. 923, argued November 5, 1975, No. 74-744. Here, as we have pointed out, the court of appeals stated that petitioner's conclusory allegations in her complaint "were neither supported by

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[6] *Sherman* v. *Nash*, 488 F.2d 1081 (C.A. 3), relied upon by petitioner (Pet. 7), is also distinguishable. There, the court of appeals remanded an injunctive suit to the district court to consider whether the assessments were intended to coerce the taxpayers for a purpose unrelated to the collection of taxes. Similarly, in *Bauer* v. *Foley*, 404 F.2d 1215 (C.A. 2) (Pet. 7), the court remanded the case to the district court to allow the taxpayer to supplement the evidence showing that her signature was forged on a joint return.

any factual allegation nor established by any evidence" (Pet. App. A 20). Thus, this case does not raise the question presented in *Shapiro*, *i.e.*, whether the Commissioner is required to prove his good faith and the facts upon which a tax assessment is based to meet the factual allegations on the taxpayer's complaint before the bar of the Anti-Injunction Act is applicable. While we believe that *Shapiro* erred in holding that the Commissioner had to prove the facts upon which the assessment was based, petitioner's failure to present any factual challenge to the assessment confirms the correctness of the court of appeals' conclusion that she did not meet the *Williams Packing* test of showing that under no circumstances would the government prevail on the merits of its claim.

3. Finally, petitioner argues (Pet. 10) that "the assistance of this Court is needed in understanding the policies and language of Section 7426, so as to provide for the proper functioning of the tax system balancing both the needs of the government for revenue and the rights of parties other than those primarily liable" and that a "decision in this case will resolve questions whose importance extends far beyond the particular facts and parties here involved." Acknowledging that the question of the applicability of Section 7426 to a transferee liability case is one of "first impression" (Pet. 9), petitioner urges that the court of appeals erred in concluding that Section 7426(a)(1) was not available to one subject to an assessment of transferee liability.

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Section 7426 provides that where a levy has been made on property, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States seeking, *inter alia*, an injunction to prohibit the enforcement of the levy. The court of appeals correctly concluded that Section 7426(a)(1) specifically excludes from its coverage any "person against whom is assessed the tax out of which such levy arose."

Here, the levy of which petitioner complains arose out of the transferee assessment assessed against her so that Section 7426(a)(1) is not applicable. Moreover, Section 7426(c) provides that "[f]or purposes of an adjudication under this section, the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid." The assessment of tax upon which the interest of the United States vis-a-vis petitioner is based is the transferee assessment. Thus, her claim that she is not a transferee challenges the validity of the assessment and, accordingly, is precluded by Section 7426(c).[7]

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[7] Section 7426 was developed by Congress in cooperation with the American Bar Association's Committee on Federal Liens (Hearings on H.R. 11256 and H.R. 11290 (Priority of Federal Tax Liens and Levies) before the House Committee on Ways and Means, 89th Cong., 2d Sess., pp. 64-65 (1966)). The Final Report of that Committee had a provision (Sec.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

7431) which was similar to Section 7426(a) (Hearings, *supra*, at p. 159). The Final Report said (Hearings, *supra*, at p. 192):

> * * * [This provision was] intended to codify the procedural rights of third parties whose property is seized or threatened with seizure for the tax liabilities of another. It has no application to the rights of the person against whom an assessment is made, whether as taxpayer, *transferee* or otherwise. *Procedures available to such persons are provided by existing provisions of the Code.* [Emphasis added.]

There is nothing in the legislative history of Section 7426 which indicates that this concept of the statute was ever rejected.

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